Jones Plastic & Engineering Company (Camden Division) *and* United Steelworkers of America, AFL–CIO, CLC. Case 26–CA–20861

September 27, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

The complaint in this case alleges that the Respondent violated Section 8(a)(3) of the Act by refusing to reinstate former striking employees.[1] The Respondent's defense is that it hired permanent replacements for all strikers before they offered to return to work. As permitted under Tennessee State law, the replacements were hired on an at-will basis, in which case the employee may be discharged without cause and is not promised employment for any defined period of time.

Federal labor law establishes an employer's right to hire employees to replace economic strikers and to retain them after the strike if the employer can prove a mutual understanding with the replacement employees that they will not be discharged to make room for returning strikers.[2] Thus, the determinative question presented here is whether employees hired on an at-will basis may be found to be permanent replacements for striking employees. In *Target Rock Corp.*, a Board majority stated that proof of at-will employment "obviously" did not support the employer's position that its striker replacements were permanent.[3] At-will employment, however, does not speak to whether a mutual understanding exists about job retention vis-à-vis returning strikers. As such, it does not detract from an employer's otherwise valid showing that it has hired permanent replacements. We therefore find, on the stipulated record, that the Respondent lawfully declined to reinstate former economic strikers because it had hired permanent replacements for them. To the extent that the Board's decision in *Target Rock* is inconsistent with the discussion below, it is overruled.

On the entire record in the case, the Board makes the following findings of fact and conclusions of law and issues the following Order.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Camden, Tennessee, is engaged in the manufacture of plastic injection molded parts. The complaint alleges, and the answer admits, that during the 12-month period ending September 30, 2003, the Respondent sold and shipped goods valued in excess of $50,000 from its facility in Camden, Tennessee, directly to points located outside the State of Tennessee, and purchased and received goods at that facility valued in excess of $50,000 directly from points located outside of the State of Tennessee. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Union was certified on April 24, 2001, as the collective-bargaining representative of a unit of production and maintenance employees at the Camden facility. Thereafter, it engaged in negotiations with the Respondent for an initial collective-bargaining agreement, but the parties did not reach an agreement. On March 20, 2002,[4] approximately 53 of the 75 unit employees engaged in an economic strike, and the Respondent began hiring replacement employees soon thereafter.

Each replacement employee completed the Respondent's standard job application, which includes the following provision: "I understand and agree that my employment is for no definite period and may . . . be terminated at any time without any previous notice." In addition, the Respondent maintains an employee handbook applicable to all employees and dated December 31, 2000. The handbook includes the following provision: "Employment at-will is our Company policy. The Com-

[1] Upon a charge filed on August 16, 2002, by United Steelworkers of America, AFL–CIO, CLC (hereafter the Union or Charging Party), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on October 8, 2003, against Jones Plastic & Engineering Company (Camden Division) (hereafter the Respondent), alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Sec. 8(a)(3) and (1) and Sec. 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On February 9, 2004, the Union, the Respondent, and the General Counsel filed with the Board a Joint Motion to Transfer Proceedings to the Board and a Stipulation of Facts. The parties agreed that the charge, the complaint and notice of hearing, the stipulation of facts, the statement of issues presented and each party's statement of position constitute the record in the case. The parties further stipulated that they waived a hearing, findings of fact, conclusions of law and an order by an administrative law judge.

On April 29, 2004, the Executive Secretary, by direction of the Board, issued an Order approving the Stipulation and transferring the proceeding to the Board. The Union, the Respondent, and the General Counsel thereafter each filed a brief. The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and LABNET, Inc., d/b/a Worklaw Network filed amicus briefs.

[2] See, e.g., *Mackay Radio & Telegraph Co*., 304 U.S. 333, 345–346 (1938), and *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003).

[3] 324 NLRB 373, 374 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998).

[4] All dates are in 2002, unless otherwise indicated.

pany may terminate employment for any reason." Each replacement employee received a copy of the handbook.

Fifty-three replacement workers who were hired in place of specific strikers signed the following form after beginning work as a replacement employee:

> I [name of replacement] hereby accept employment with Jones Plastic & Engineering Company, LLC, Camden division (hereafter "Jones Plastic") as a permanent replacement for [name of striker] who is presently on strike against Jones Plastic. I understand that my employment with Jones Plastic may be terminated by myself or by Jones Plastic at any time, with or without cause. I further understand that my employment may be terminated as a result of a strike settlement agreement reached between Jones Plastic and the U.S.W.A. Local Union 224 or by order of the National Labor Relations Board.

Thirty-three replacement employees who were hired to replace other replacement employees signed the following form:

> I [name of replacement] hereby accept employment with Jones Plastic & Engineering Company, LLC, Camden division (hereafter "Jones Plastic") as a permanent replacement for a striker who is presently on strike against Jones Plastic. I understand that my employment with Jones Plastic may be terminated by myself or by Jones Plastic at any time, with or without cause. I further understand that my employment may be terminated as a result of a strike settlement agreement reached between Jones Plastic and the U.S.W.A. Local Union 224 or by order of the National Labor Relations Board.

Three replacement employees gave Board affidavits during the investigation. One replacement employee, hired in early April, stated that the Respondent's human resource manager, Sylvia Page, informed him that he was a full-time and permanent employee. Another replacement employee, hired in mid-May, stated that he quit his old job to work as a replacement and that he believed he was permanent because nobody told him otherwise. The third replacement employee, hired in early June, stated that Page told her she was a full-time employee and she believed she was a permanent employee because she received the same pay and benefits as the striking employees.

The Respondent sent a letter to each striking employee on April 5 stating that it had "begun to hire permanent replacement employees" and that the striker risked being permanently replaced if he or she failed to report for work immediately. On July 31, the Union made an unconditional offer to return to work on behalf of all the striking employees. That same day, the Respondent sent a letter to the Union informing it that the Respondent had a full complement of permanent replacement employees and that the returning strikers would be placed on a preferential recall list. On various dates in September, the Respondent made offers of reinstatement to 46 employees. Eighteen former strikers accepted the offer; the remainder did not.[5]

B. Issues Presented

Consistent with the parties' stipulation, the issues presented for resolution before the Board are as follows:

(1) Whether the majority's view in *Target Rock,* supra, that at-will employment is evidence that striker replacements are not permanent replacements, should continue to be governing law.

(2) Whether the Respondent hired permanent or temporary replacement employees based upon the determination of the applicable law on the issue.

(3) Whether the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate striking employees upon their unconditional offer to return to work.

C. The Board's Decision in Target Rock

In *Target Rock,* the Board found that the employer violated Section 8(a)(3) and (1) of the Act by refusing to reinstate certain economic strikers following their unconditional offer to return to work. A Board majority relied in part on the fact that the employer's application form contained the following statement: "I understand that the employer follows an employment-at-will policy in that I or the employer may terminate my employment at any time, or for any reason consistent with applicable state or federal law." According to the *Target Rock* majority, this statement "obviously [did] not support the [r]espondent's position that the striker replacements were permanent." Supra at 374.

The majority's explanation for this position appeared in a single footnote paragraph. Id. at 374 fn. 9. It acknowledged the Supreme Court's view in *Belknap v. Hale*, 463 U.S. 491 (1983), that the inclusion of certain conditions in an offer of employment to a replacement would not necessarily foreclose finding that the offer was permanent, but it interpreted the Court's discussion of *Covington Furniture Mfg.*[6] as making "clear that the kinds of 'conditional' offers it believed could be defended as offers of permanent employment did not in-

[5] Six former striking employees were not offered reinstatement due to strike misconduct. The failure to reinstate these former striking employees is not at issue.

[6] 212 NLRB 214 (1974), enfd. 514 F.2d 995 (6th Cir. 1975).

clude offers of [at-will employment]." *Target Rock*, supra at 374 fn. 9.

The Board also relied on a number of other facts in finding that the replacement workers in *Target Rock* were not permanent, including the language of the advertisement to which the majority of the replacements responded, which stated in part that "[a]ll positions could lead to permanent full-time after the strike." Id. at 373. The Board further found that the employment and screening forms given to each replacement contained no references to permanent employment. Id. at 374. Additionally, on several occasions during the strike, the employer's representatives stated that the replacements were temporary and would be discharged if the strikers made an unconditional offer to return to work. Thus, for all of the above reasons, the Board found that the replacements were not permanent and that the employer violated the Act by refusing to reinstate the strikers upon their unconditional offer to return to work.

On these same facts, former Member Higgins agreed with the *Target Rock* majority's conclusion that the replacements were not permanent. He disagreed, however, with the majority's reliance on the at-will disclaimer as grounds for that conclusion. Instead, Member Higgins interpreted the term "permanent replacement," in the context of labor law, to connote the mutually understood intention that an employer would retain replacement employees after strikers offer to return. In his view, this intention is not the same as a binding, unconditional promise of employment. Thus, the employer could state his intention and nonetheless state that no promise of employment is made, i.e., that employment is at will. The at-will disclaimer is a legitimate protection against individual employee lawsuits grounded in state law, and not inconsistent with an intention to retain replacements even after strikers offer to return.

D. Contentions of the Parties and Amici

The General Counsel concedes that, consistent with the *Target Rock* majority opinion, the Respondent's use of "at-will" language in its hiring forms "may be viewed as depriving the replacement employees of their permanent status." However, the General Counsel asserts that the "better view" of the law is that set forth in former Member Higgins' *Target Rock* concurrence, under which use of the term "at-will" does not preclude a finding of permanent replacement status. The General Counsel contends that the term "at-will" merely serves as a reminder to the replacement employees of the Respondent's existing right under state law to terminate any employee with or without cause. "Permanent replacement," on the other hand, connotes an intention to retain the replacements after strikers unconditionally offer to return to work.

Applying those principles here, the General Counsel contends that the Respondent hired permanent replacements based on three factors: the language on the replacement form signed by each replacement employee stating that the replacement was a permanent employee; the letter that the Respondent sent to striking employees stating that it was hiring permanent replacement employees; and the absence of evidence in job advertisements, applications, and interviews contradicting the replacement employees' status as permanent.

The Respondent largely agrees with the General Counsel's position. It argues that the *Target Rock* majority held as a matter of law that the at-will disclaimers in that case "negated the permanency of [the replacement employees'] employment" and that it erred in doing so. The Respondent asserts that it hired permanent replacements and therefore did not violate the Act when it failed to reinstate the economic strikers.

The Charging Party argues that the *Target Rock* majority held that "an at-will employee cannot be a permanent replacement" and that it was correct in doing so. The Charging Party contends that permanent replacement status requires proof that an employer has promised not to terminate the replacement in circumstances where the employer is not found guilty of unfair labor practices, does not settle with the union, or settles without a promise to reinstate. This promise, according to the Charging Party, creates an enforceable contract between the permanent replacement and the employer. By contrast, the essence of at-will employment is that an at-will employee has no enforceable contract rights against the employer preventing his termination.

The Charging Party suggests, however, that *Target Rock* can be harmonized with the at-will employment doctrine. It argues that an employer could expressly reserve the right to terminate a replacement at any time for any reason other than to permit the return of a striker in the absence of a Board order or strike settlement providing for the reinstatement of strikers. That reservation of rights is not inconsistent with permanent replacement status because an employer would still be liable for breach of contract if it discharged a replacement to permit the return of a striker in contravention of its commitment. The Charging Party asserts that the Respondent did not limit its at-will disclaimer in such a manner and thus cannot show that it hired permanent replacements.

The AFL–CIO similarly argues in its amicus brief that for replacement employees to be permanent, there must be a contractual promise of permanent employment. If

an employer has reserved the right to terminate the employee at any time with or without reason, then it has not made a contractual promise of permanent employment. Here, the AFL–CIO argues, the Respondent left its options open with regard to the tenure of the replacement employees. If it had discharged some of them to make way for returning strikers, it would not have broken any promise made to them. Therefore, according to the AFL–CIO, the Respondent's offer of at-will employment to replacement employees was insufficient to justify its later refusal to reinstate the strikers.

The Worklaw Network argues in its amicus brief that at-will disclaimers allow employers to protect themselves from the "proliferation of abusive discharge cases" in state courts based upon court-crafted exceptions to the employment-at-will rule. The Worklaw Network argues that the disclaimers do not negate any representations the employer has made to its replacement work force that striking employees who may request reinstatement will not displace them. Because the disclaimers do not alter the employer's obligations under the Act, they should not be given any probative weight in determining whether the replacements are permanent.

III. DISCUSSION

The respective rights of economic strikers and replacement workers are well established. An economic striker who unconditionally offers to return to work is entitled to immediate reinstatement unless the employer can show a legitimate and substantial business justification for refusing to reinstate the former striker. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). One such legitimate and substantial business justification is an employer's permanent replacement of economic strikers as a means of continuing its business operations during a strike. *Mackay Radio & Telegraph Co. v. NLRB*, 304 U.S. 333, 345–346 (1938). Thus, at the conclusion of a strike, an employer is not bound to discharge those hired to fill the places of economic strikers if it made assurances to those replacements that their employment would be permanent. Id. This is an affirmative defense, and the employer has the burden of proving that it hired permanent replacements. *Associated Grocers*, 253 NLRB 31 (1980), enfd. 672 F.2d 892 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982). To meet its burden, the employer must show a mutual understanding with the replacements that they are permanent. *Consolidated Delivery & Logistics*, supra at 526; *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987). In particular, permanent replacement "connotes a replacement who will not be displaced by returning strikers when the strike is over." *Capehorn Industry,* 336 NLRB 364, 365 (2001), citing *Belknap*, supra at 501 fn. 6.

Here, the Respondent issued to the replacement employees forms that stated they were permanent replacements for striking employees. Many of those forms even named the striker whom the individual was hired to permanently replace. The Respondent also told the striking employees that it had begun to hire permanent replacements and that they risked being permanently replaced if they did not return to work. The Respondent's human resource manager also told one replacement that he was a permanent employee. Standing alone, this evidence clearly would be sufficient to establish that the Respondent hired permanent replacements. *Supervalu, Inc.,* 347 NLRB 404, 416 (2006) (employees who signed forms stating they were permanent replacements for strikers held to be permanent employees); *J.M.A Holdings, Inc.,* 310 NLRB 1349, 1358, 1360–1361 (1993) (permanent replacement status found, where it was employer's policy to inform replacements that they were hired on a permanent basis and this was communicated to and relied on by numerous employees).

As discussed above, however, the *Target Rock* majority opinion suggests that the Respondent's at-will disclaimers informing employees that their employment was for "no definite period" and could be terminated for "any reason" and "at any time, with or without cause" detract from its showing of permanent replacement status. We disagree. That view is based on a misreading of controlling law and is inconsistent with the basic scheme of the Act. We therefore decline to follow it.

The sole basis for the *Target Rock* majority's view concerning at-will disclaimers was its reading of the Supreme Court's decision in *Belknap*. There, the Court held that the Act did not preempt a state court breach of contract suit by striker replacements who were laid off in favor of returning strikers in alleged violation of a promise of "permanent" employment. The Court viewed the suit as entirely consistent with the Act, and found "unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damage suits for the employer's breach of these very promises." 463 U.S. at 500.

The Court stressed that its holding was not in derogation of Federal labor policy favoring settlement of labor disputes. It reasoned that even facially unconditional promises of permanent employment are as a matter of law "defeasible" if strikers are ordered reinstated by the Board because a strike "turns out to be an unfair labor practice strike" or "if the employer chooses to settle with

the union and reinstate the strikers." Id. at 504 fn. 8. The Court further stated that specification of those conditions in an employment contract with a replacement "would not in itself render the replacement a temporary employee subject to displacement by a striker. . . ." Id. at 503. Rather, such a contract would still "create a sufficiently permanent arrangement to permit the prevailing employer to abide by its promises" not to displace the replacements to make way for the returning strikers. Id. at 504.

The Court noted that the replacements in *Belknap* additionally were subject to discharge in the event of a business slowdown and stated that this condition also did not render the hirings temporary. Id. at 504 fn. 8. As the Court recognized "[t]hat the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional." Id.

As previously stated, the *Target Rock* majority interpreted *Belknap* as excluding at-will employment offers to striker replacements from the category of conditions that would not necessarily foreclose a finding that the offers were permanent. On the contrary, the Court in *Belknap* did not "make clear" that at-will employment status was inconsistent with permanent employment. That issue was not even presented in *Belknap.* There was no "at will" disclaimer in *Belknap.*

Nor was there an "at will" disclaimer in *Covington*, supra, a case distinguished by the Court in *Belknap.* In finding no permanent replacement status in *Covington*, the Board relied on the "absence of any promise by the [employer] to the replacements that they were permanent replacements" plus affirmative evidence that the replacements were hired as trainees, with the employer in many cases "hiring two trainees for each job and dropping the poorer of the two performers shortly after the hiring." *Covington,* supra at 220. It was the absence of *any* promise of permanent status, not any evidence of at-will employment status (for none was cited in the case), that was dispositive in *Covington.*

Consistent with the above, the Court in *Belknap* did not, and could not, have construed *Covington* in the manner suggested by the *Target Rock* majority. Neither *Belknap* nor *Covington* addressed at-will employment status in any way. Instead, the Court considered *Covington* in connection with its rejection of the claim that the Board had determined that an offer subject to settlement with the union was not a permanent employment arrangement. The Court stated that "*Covington Furniture Mfg. Corp.,* 212 NLRB 214 (1974), enfd. 514 F.2d 995 (6th Cir. 1975) is not to the contrary. There the replacements could be fired at the will of the employer for any reason; the employer would violate no promise made to a replacement if he discharged some of them to make way for returning strikers . . . ." 463 U.S. at 504 fn. 8. But the reason the employer "would violate no promise" was, as discussed above, that it never made any promise of permanent employment at all, not that it affirmatively told employees that their employment was "at will."

The Board has found permanent replacement status in cases where employees could be discharged without cause. In *Kansas Milling Co.*, 97 NLRB 219, 225–226 (1951), for example, probationary employees were permanent replacements even though they had not completed their probationary period by the date on which the strikers made unconditional offers to return and their continued employment was subject to their proving themselves qualified. The Board stressed that, in hiring these employees on a probationary basis, the employer "was following its normal employment practices." Id. at 226. In these circumstances, its assurances to employees that "they could look forward to permanent positions with the [r]espondent if they were able to qualify for the jobs on which they were placed" established their status as permanent replacements. Id. at 223. Accord: *Guenther & Son,* 174 NLRB 1202, 1212 (1969), enfd. sub nom. *Pioneer Flour Mills v. NLRB,* 427 F.2d 983 (5th Cir. 1970), cert. denied 400 U.S. 942 (1970); *Anderson, Clayton & Co.,* 120 NLRB 1208, 1214 (1958) (replacements serving 6-month probationary period during which employer was free to discharge them "without recourse" were permanent replacements).

The Board specifically reaffirmed this precedent, and relied on *Belknap* when doing so, in *Solar Turbines*, 302 NLRB 14 (1991), affd. sub nom. *Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993). There, the Board found that the employer offered replacements permanent employment, even though they were required to submit to a physical examination and drug and alcohol testing before they could begin work. The Board stated that these posthire conditions to active service, like the conditional posthire probationary period in the earlier cases, were consistent with the employer's "normal employment practices" and did not detract from its clear commitment to hire the replacements on a permanent basis. Id. at 15.[7] The Board drew specific support for its analysis from the observation in *Belknap* that conditions placed on employment do "not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional." Id. (quoting *Belknap*, supra at 504 fn. 8). Based on this statement, the Board reasoned that "[a]

[7] See also *Supervalu*, supra, slip op. at 13 (employees whose continued employment was subject to passing ability test, drug test, and physical were permanent replacements).

fortiori, so long as the replacement workers and the Respondent intended that the workers' employment not terminate at the conclusion of the strike, the fact that the replacements had yet to complete these postinterview tests at the conclusion of the strike did not render them temporary workers subject to discharge." Id. at 15–16 (footnote omitted). See also *J.M.A. Holdings,* supra (same).

The Board majority in *Target Rock* did not cite *Solar Turbines* or the cases upon which that decision relied, much less distinguish them. In light of these precedents, we view as untenable any implication in *Target Rock* that conditions on hiring other than those enumerated in *Belknap* detract from a finding of permanent replacement status. Instead, we find that the status of the replacements hired by the Respondent in this case is indistinguishable from the status of probationary employees found to be permanent replacements in *Kansas Milling*, supra, and its progeny. In those cases, the probationary employees were subject to discharge without cause, and their postprobation employment was subject to their satisfaction of the employer's standards. As a matter of law, then, equivalent conditions imposed by the Respondent through its at-will disclaimers do not detract from other evidence proving the replacements' status as "permanent employees" for the purpose of Federal labor law.

In this regard, we stress, as did the Board in *Kansas Milling* and *Solar Turbines,* that the Respondent "was following its normal employment practices" by offering the replacements employment on an at-will basis. Its employee handbook, which was in effect at all times material to this proceeding and is dated December 31, 2000, makes clear that all employees, strikers and replacements alike, were hired and employed on an at-will basis.[8] *Target Rock,* however, indicates that this at-will status detracts from the Respondent's showing that the replacement employees were permanent replacements. Indeed, as the briefs filed in this case make clear, *Target Rock* has even been read to *preclude* at-will employment for permanent replacements. To hire permanent replacements under this view, the Respondent would have had to offer them tenure rights superior to those enjoyed by the strikers. Doing so, however, would permanently disadvantage the strikers (who would remain at-will employees) in contravention of the Act's fundamental principles. See *NLRB v. Erie Resistor*, 373 U.S. 221 (1963) (award of superseniority to nonstrikers was unlawful and inherently destructive of Section 7 rights because it permanently penalized employees for striking in a manner that created continuing obstacles to the future exercise of those rights). The *Target Rock* majority view of at-will employment status for replacements thus would effectively preclude the lawful hiring of permanent replacements in any case where strikers are employed on an at-will basis. This result cannot be reconciled with the well-established doctrine permitting the hiring of permanent replacements under *Mackay Radio*.[9]

Curiously, our dissenting colleagues deny that *Target Rock* stands for the proposition that an offer of at-will employment undermines a finding of permanent replacement status.[10] Despite that denial, they then proceed to apply precisely that proposition in contending that the Respondent's statements about at-will employment in this case weigh against finding that the replacements are permanent. In their view, the Respondent's pairing of replacements with displaced strikers, and repeated assurances that the replacements were permanent, were insufficient, without more, to establish permanent

[8] Apparently, the same was not true in *Target Rock*, supra at 383 (employer's proposal during negotiations to implement at-will employment for all employees was change in position).

[9] The Charging Party argues for a rule requiring employers that seek to hire at-will permanent replacements to explicitly advise employees that they cannot be discharged to make way for returning strikers. While language to that effect would support a finding of permanent replacement status, the Board has in the past eschewed a requirement that specific language be used to establish the required mutual understanding of "permanent" employee status. *Crown Beer Distributors*, 296 NLRB 541, 549 (1989) (no requirement that "magic word" *permanent* be used where both sides understood employment was permanent). Where, as here, that understanding is established without the use of such language, we will continue to find that strikers have been permanently replaced. Similarly, we reject the Charging Party's and amicus AFL–CIO's contention that for replacements to be permanent, there must be an enforceable contract between the replacement and the employer. No requirement of this nature has ever been imposed by any Board or court decision. In *Belknap*, the Supreme Court did not hold that there must be an enforceable contract to establish permanent replacement status. Instead, the Court held only that the Act did not preclude the enforcement of such a contract if it existed. Moreover, this proposed standard would make the determination of permanent replacement status dependent on whether an enforceable contract was formed under State law. The requirements for formation of such a contract will necessarily vary from one state to another, whereas the Board is charged with fashioning a uniform national labor policy.

[10] Our colleagues' interpretation of the *Target Rock* decision is at odds with the plain language of that case. There, the majority cited to the at-will provisions several times, referring to the term as "equivocal." *Target Rock*, supra at 375. The majority also distinguished *Belknap, Inc.*, supra, on the basis that similar at-will language was not present in that case, and cited to *Covington Furniture Mfg. Corp.,* supra, for the proposition that at-will employment was not the type of "conditional offer[ ]" that could be defended as an offer of permanent employment. *Target Rock*, supra at 374 fn. 9. Moreover, concurring Member Higgins felt compelled to write separately in *Target Rock* to distance himself from the majority's reliance on at-will language as undercutting permanent replacement status. Consequently, if we are misreading *Target Rock*, we appear to be in the good company of the participating members in that case. In any event, our holding today dispels any doubt created by that decision with respect to the use of at-will language in job offers to permanent replacements.

replacement status. We disagree, for the reasons stated above. While insisting that the at-will statements are not "fatal" to the Respondent's position, our colleagues clearly rely on those statements as evidence detracting from permanent replacement status. In effect, our dissenting colleagues would not find permanent replacement status absent a specific contractual limitation on an employer's common-law right to establish at-will employment relationships.[11] That position is the very interpretation of *Target Rock* that the General Counsel asks us to overrule in this case. It is also the interpretation of *Target Rock* that the Charging Party and amicus AFL–CIO press us to adopt. We conclude that the General Counsel's argument is the better one, and the one most consistent with applicable precedent and the practical realities of modern employment relationships.[12]

In sum, for all of the foregoing reasons, we find that *Target Rock* must be overruled to the extent that it suggests that at-will employment is inconsistent with or detracts from an otherwise valid showing of permanent replacement status. As discussed above, the Respondent has established a mutual understanding with its replacement employees that they were permanent employees, *Consolidated Delivery & Logistics*, supra, and its at-will disclaimers do not detract from this showing. No other evidence in this case detracts from that showing either. For these reasons, we find that the replacement employees were permanent replacements and that the Respondent therefore did not violate Section 8(a)(3) and (1) by refusing to reinstate the former strikers. Accordingly, we shall dismiss the complaint.

CONCLUSIONS OF LAW

1. Respondent Jones Plastic & Engineering Company (Camden Division) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

ORDER

The complaint is dismissed.

[11] The dissent advances this view despite the clear evidence that the strikers also were employed on an at-will basis.

[12] We are not, as our dissenting colleagues suggest, "anxious" to overrule precedent; we are, however, anxious to clarify an area of law muddled—as the parties and amici appear to agree—by the Board's prior decision in *Target Rock*.

MEMBER LIEBMAN and MEMBER WALSH, dissenting.

Anxious to make a show of reversing precedent, the majority reads *Target Rock* to stand for a proposition that it does *not* state and for which it has never been cited. The majority purports to overrule that reading, and then to apply its understanding of what the law is to find that the strike replacements hired by the Respondent were permanent employees.

Each step in the majority's analysis is erroneous. *Target Rock* does not state that an employer's declaration that replacements are "at-will employees" precludes a finding that those replacements are permanent.[1] Nor has that ever been the law. Rather, the question is whether the employer can establish that it and the replacement employees shared a mutual understanding that the replacements were "permanent" within the meaning of *Belknap, Inc. v. Hale*,[2] and other applicable precedent. Because the Respondent failed to do so here, we would find that its refusal to reinstate the strikers violated Section 8(a)(3) and (1) of the Act.

A. Facts

In April 2001, the Board certified the Union as the representative of the Respondent's production and maintenance employees. In March 2002, the parties having failed to reach an accord on an initial collective-bargaining agreement, most of the unit employees went out on strike. The Respondent soon began hiring replacements for the strikers.

Each replacement applicant completed the Respondent's standard employment application, which included the following statement: "I understand and agree that my employment is for no definite period and may . . . be terminated at any time without any previous notice." In addition, the Respondent's employee handbook included the following statement: "Employment at-will is our Company policy. The Company may terminate employment for any reason." Each replacement employee received a copy of the handbook.

The Respondent hired replacements for 53 striking employees. Each of those replacements was required to sign the following form:

> I [name of replacement] hereby accept employment with Jones Plastic & Engineering Company, LLC, Camden division (hereafter "Jones Plastic") as a permanent replacement for [name of striker] who is presently on strike against Jones Plastic. I understand that my employment with Jones Plastic may be terminated by myself or by Jones Plastic at any time, with or with-

[1] Indeed, as we show below, that is only one of several, mutually inconsistent meanings that the majority ascribes to *Target Rock*.

[2] 463 U.S. 491 (1983).

> out cause. I further understand that my employment may be terminated as a result of a strike settlement agreement reached between Jones Plastic and the U.S.W.A. Local Union 224 or by order of the National Labor Relations Board.

An additional 33 replacements were hired to replace other replacement employees whose employment terminated during the strike. Each of those replacements was required to sign the following form:

> I [name of replacement] hereby accept employment with Jones Plastic & Engineering Company, LLC, Camden division (hereafter "Jones Plastic") as a permanent replacement for a striker who is presently on strike against Jones Plastic. I understand that my employment with Jones Plastic may be terminated by myself or by Jones Plastic at any time, with or without cause. I further understand that my employment may be terminated as a result of a strike settlement agreement reached between Jones Plastic and the U.S.W.A. Local Union 224 or by order of the National Labor Relations Board.

B. Strike Replacements: Generally Applicable Principles

The principles generally applicable to replacement of economic strikers are well settled. Economic strikers who unconditionally offer to return to work are entitled to immediate reinstatement unless the employer can show a legitimate and substantial business justification for refusing to reinstate them. *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967). One such justification is that the employer has permanently replaced the strikers in an effort to protect and continue its business. *Mackay Radio & Telegraph Co*., 304 U.S. 333, 345–346 (1938). Permanent replacement is, therefore, a defense to an allegation that an employer has unlawfully refused to reinstate economic strikers. The employer bears the burden of establishing that defense. *Capehorn Industry*, 336 NLRB 364, 365 (2001); *Associated Grocers*, 253 NLRB 31 (1980), enfd. 672 F.2d 892 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982). An employer does so by establishing that there was a mutual understanding between it and the replacements that the replacements were "permanent," i.e., that they would not be displaced by returning strikers unless it was pursuant to the terms of a strike settlement agreement between the employer and the union or by order of the Board. *Capehorn Industry*, supra at 365; *Belknap,* supra at 501, 503–504. If, however, the employer hires replacements "without a commitment," and leaves them with the understanding that they may be displaced to make room for returning strikers even in the absence of a strike settlement (or for any other reason), the replacements will not be deemed permanent and the employer will not have a substantial business justification for refusing to reinstate the strikers. *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 573 (7th Cir. 1980). See also *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987); *Covington Furniture Mfg. Corp.*, 212 NLRB 214, 220 (1974) (employer "must [make] a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses.")[3]

Finally, the case law is clear that "the presence or absence of the magic word 'permanent' is not the sine qua non of the determination of permanent employment." *Target Rock*, supra at 373 fn. 4 (quoting *Crown Beer Distributors*, 296 NLRB 541, 549 (1989), enfd. mem. 172 F.3d 921 (D.C. Cir. 1998)). Thus, where the employer's "offer of permanent employment" is one that in actuality provides that the replacements "could be fired at the will of the employer for any reason," id. at 374 fn. 9 (citing *Belknap*, supra at 504–505 fn. 8), it will not justify a refusal to reinstate strikers. Simply put, it is not enough to say to the replacements that they are "permanent."

C. Target Rock

The question presented in *Target Rock* was, as in this case, whether economic strike replacement employees were permanent or temporary replacements. Regarding the understanding of the replacements, the following evidence was credited: Almost all of the replacements had contacted the employer in response to its advertisement stating it had positions available that "*could lead to* permanent full-time after the strike" (emphasis added). The employer told the replacements that it considered them "permanent at-will employees" unless the Board determined otherwise or as a result of a settlement between the employer and the union. The employment application and drug screening forms that the replacements completed, however, made no reference to permanent employment. The application required that the applicant sign the following statement:

[3] In essence, the *Belknap* Court elaborated on the meaning of *Fleetwood Trailer* by stating as follows: "The refusal to fire permanent replacements *because of commitments made to them* in the course of the strike satisfies the requirement of *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967), that the employer have a 'legitimate and substantial justification' for its refusal to reinstate strikers." 463 U.S. at 504 fn. 8 (emphasis added). Thus, it is the promise to the replacements of some right vis-à-vis the strikers that creates permanent status: "strikers . . . are entitled to reinstatement" unless the employer has made a commitment to the replacements that would be breached if the employer "discharg[ed] them to make way for selected strikers . . . ." Id. at 503–504.

> I understand that the employer follows an employment-at-will policy in that I or the employer may terminate my employment at any time, or for any reason consistent with applicable state or federal law.

324 NLRB at 373–374. Several months into the strike, when it appeared that the strikers might soon be returning to work, the replacements were distressed over the prospect of losing their jobs. The employer responded by circulating a memorandum again advising the replacements that they were "permanent-at-will employees unless the National Labor Relations Board considers you otherwise or a settlement with the Union alters your status to temporary replacement." The announcement did not calm the replacements' fears.[4] Regarding the understanding of the employer, the credited evidence showed that the employer repeatedly told the union and the employees (and, on one occasion, the Board) that the replacements were "temporary."[5]

On that record, the Board found that neither the employer nor the replacements understood that the replacements were permanent replacements. Regarding the employer, the Board found that it "did not intend the replacements to be permanent employees but intended, at most, to keep its options open to make them permanent employees later if it so chose."[6] Regarding the replacements, the Board found that there was insufficient evidence that they regarded themselves as permanent. Rather, the Board found it more likely that the effect of the job advertisement and the employer's subsequent statements and actions was to leave the replacements confused and unsure as to their status. In so finding, the Board observed in passing that the language of the employer's application form regarding its employment-at-will policy "obviously did not support the [employer's] position that the striker replacements were permanent."[7] Overall, the Board found that the evidence did not support a finding that the employer and the replacements "share[d] any mutual understanding that the replacements were hired as permanent employees."[8]

In a concurring opinion, Member Higgins stated that an employer's intention, mutually understood by the employer and the strike replacements, to retain the replacements even after the strikers offered to return to work (i.e., an employer's intention that the replacements be permanent) could legitimately be coupled with the employer's statement to the replacements that their employment was "at-will." Member Higgins stated that such a statement did not vitiate the intention to make the replacements permanent. The majority did not express any disagreement with Member Higgins' opinion. Indeed, it did not respond to it.

What then, does *Target Rock* stand for? It applied existing law concerning the requirement of a mutual understanding of permanent replacement to its particular facts. As for the majority's statement that the employer's expression of its at-will policy did not support a finding of permanent status, that is a truism. The majority did not say that at-will employment was incompatible with permanent replacement, nor even that it was evidence against a finding of permanent replacement. The majority merely stated that an employer's avowal of an at-will policy does not lend support to an affirmative defense of permanent employment. Like the *Target Rock* majority, we regard that as "obvious[]."[9]

Prior to *Target Rock*, the Board had held that at-will employment was *not* incompatible with permanent replacement status. *J.M.A. Holdings*.[10] In *Target Rock*, the Board did not overrule *J.M.A. Holdings* or even mention it. In the final analysis, neither *Target Rock* nor any other case stands for the proposition that the majority purports to overrule. In our view, the majority's strained effort to overrule a nonexistent holding can be explained only by its desire to reverse precedent.[11]

[4] Id. at 374, 379–380.

[5] Id. at 374.

[6] Id.

[7] Id. (fn. omitted). The Board also noted that, although the Court in *Belknap, Inc. v. Hale*, supra, expressed the view that the inclusion of conditions in an offer of employment would not necessarily foreclose a finding that the offer was for permanent employment, the Court did not include in its examples of such conditions statements to the effect that the employee could be discharged at any time for any reason.

[8] Id. at 375.

[9] Id. at 374. In the present decision, the majority occasionally characterizes *Target Rock* as holding that at-will employment is inconsistent with permanent replacement, occasionally as holding that at-will employment is evidence that detracts from a finding of permanent replacement, and occasionally, accurately, as holding that at-will employment does not support a finding of permanent replacement. Of course, *Target Rock* cannot stand for all of those propositions, which are all conceptually different.

[10] 310 NLRB 1349, 1358, 1360–1361 (1993) (strike replacements who were notified in writing by the employer that (1) they were permanent employees and (2) their employment was "at will" (which was explained to the replacements as meaning that the employer reserved the right to terminate them for any reason at any time) were found to be permanent replacements, whom the employer was not obligated to discharge in order to make room for returning economic strikers).

[11] Although the majority asserts that "*Target Rock* has even been read to preclude at-will employment for permanent replacements," it cites no case in support of that assertion, and we have found none. Instead, the best the majority can do is to offer arguments from the parties' briefs. From there, the majority springboards to its otherwise unsupported assertion that "[t]he *Target Rock* majority view of at-will employment status for replacements would effectively preclude the lawful hiring of permanent replacements in any case where strikers are employed on an at-will basis."

The majority also states that *Target Rock* found that the at-will provisions in that case were equivocal. Here again, the majority inaccurately describes *Target Rock*. What the Board actually found equivocal under the circumstances were not straightforward declarations of at-will

Although we disagree with the majority's determination in the present case that the replacements were permanent, that disagreement has nothing to do with *Target Rock*, properly understood. Rather, it turns on the facts of the case: the Respondent has simply failed to establish the existence of the requisite mutual understanding of permanent status.

D. The Present Case

The replacements here were required to sign a statement stating that they were "permanent replacement[s]," but that they could be "terminated . . . at any time, with or without cause." The statement then stated, "I further understand that my employment may be terminated as a result of a strike settlement agreement . . . or by order [of] the National Labor Relations Board."

Had the Respondent made only the latter statement, a finding that the replacements were permanent would follow. But the Respondent did not so limit itself. Rather, it told the employees not only that they could be displaced as a result of a strike settlement or Board order, but, *additionally*, that they could be discharged at any time for any reason. Taken together—and absent any other evidence of mutual understanding of permanence—the Respondents' statements did not reflect any commitment by the Respondent to the replacements.[12] Certainly, the statements did not reflect a commitment that the Respondent would refuse, in the absence of a strike settlement, to reinstate strikers if it meant terminating replacements. Although the Respondent used the term "permanent replacement," it then undercut that statement by failing to give the replacements any assurance that they had rights vis-à-vis the strikers.[13] In the words of *Belknap*, supra at 505 fn. 8, the Respondent's statements, like those of the employer in *Covington Furniture*, supra, created a situation in which "the replacement could be fired at the will of the employer for any reason; the employer would violate no promise made to a replacement if it discharged some of them to make way for returning strikers. . . ." Or, in the simpler formulation of the Board, the Respondent, by its statements, "kept [all] its options open." *Target Rock*, supra at 375. As a result, the evidence fails to support a finding that the Respondent and the replacements shared an understanding that the replacements were permanent.

E. Conclusion

Like *Target Rock*, this case turns on its facts. The Respondent's avoidance of any kind of commitment to the replacement employees precludes a finding of a mutual understanding of permanent employment. Accordingly, the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work.

employment, but rather the employer's statements to the replacement employees, in the context of its other actions and statements, that they were "considered permanent at-will employees." 324 NLRB at 374–375.

[12] That is the crucial aspect of this case, and the majority fails to acknowledge it. Contrary to the majority's claim, and as articulated in our discussion above, we are not simply finding that the Respondent's statements regarding at-will employment, without more, either establish that the replacement employees were not permanent or detract from a finding of permanence.

[13] As shown above, the Respondent's use of the word "permanent," in and of itself, does not establish that the Respondent made any promise to the replacements. Although the Respondent's recitation of at-will language is not fatal to its position, the use of that language does not lend support to it.